IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-496

BENSON A. WOLMAN, ET AL.,
Appellants,

v.

MARTIN W. ESSEX, ET AL.,
Appellees.

On Appeal From the United States District Court For the Southern District of Ohio

MOTION TO DISMISS OR AFFIRM

DAVID J. YOUNG
250 East Broad Street
Columbus, Ohio 43215
614-228-4371

Attorney for Appellees
James Grit, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-496

BENSON A. WOLMAN, ET AL.,
Appellants,
v.
MARTIN W. ESSEX, ET AL.,
Appellees.

On Appeal From the United States District Court For the Southern District of Ohio

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees James Grit, Ewald Kane, Helen S. Kowloski and Alvin Shames move to dismiss this appeal or, in the alternative, to affirm the judgment below, on the grounds that the appeal does not present a substantial federal question; that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument; that the unanimous Three-Judge Court Opinion reflects a proper application of the principles enunciated in *Meek* v. *Pittenger*, 421 U.S. 349 (1975); that the issues presented by appellants arise out of a background unique to the State of Ohio and are primarily of local concern; and that the primary purposes and effects of the Act are secular and can be implemented without excessive governmental entanglement with religion.

Argument

A. The Issues Raised by Appellants Arise Out of a Background Unique to Ohio and These Issues Are Primarily of Local Concern.

Background.

The State of Ohio has been furnishing health and remedial services and supplemental instructional materials to public and nonpublic school children alike for many years. Although Ohio cannot cite this Court to the "full page of history" alluded to in *Waltz* v. *Tax Commissioner*, 397 U.S. 664 (1970), it can point to a nine-year history of implementation of this program without evidence of abuse, aid to religion, entanglement between state and religion or political divisiveness.

Section 3317.06(H) of the Ohio Revised Code (the predecessor of current R.C. 3317.06) was enacted by the Ohio General Assembly in 1967. This legislation was enacted and has been revised periodically as a portion of omnibus education legislation directed for the most part to public school assistance. All aid to the nonpublic school pupils is channeled through the local public school districts. Each division of the Act is independent and fully severable. No monies are allocated to religious organizations, to nonpublic schools or to nonpublic school parents or pupils. Services and materials may not exceed those available to public school pupils. This assistance is provided only if teachers are hired and pupils admitted in the nonpublic school without distinction on the basis of race, religion or national origin.

No Evidence of Abuse.

To be sure, the Ohio General Assembly has restructured this legialation over the years in order to honor new tests or guidelines announced by this Court. But, even though the formula and mechanics have been recurrently restructured in order to meet this Court's criteria, the fact remains that Ohio, unlike other states, has a unique, nine-year history of implementation of this sort of assistance. It was in consideration of this nine-year history that the lower court did not see fit to decide the case on the basis of speculation, conjecture or presumptions. The lower court was well aware that the predecessor of the challenged legislation has been carried out without aiding religion and without excessive entanglement between church and state. Appellants didn't present any evidence to the contrary.

Prior Litigation.

Plaintiffs sought to prove that auxiliary assistance aided religion and created entanglement between church and state in the case testing the constitutionality of the predecessor of R.C. 3317.06. The record in *P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971) reflects an extensive trial with opposing counsel examining and cross-examining publicly-hired and controlled personnel providing the health and auxiliary services, parents, teachers, members of the clergy and public school administrators. The specific question in that case was whether there had been attempts to divert materials and equipment to religious use or to hire personnel that might succumb to sectarianism. Plaintiffs in that case failed to prove any such abuse. The lengthy record reflected ad-

mirable adherence to the letter of the law. This is why the constitutionality of the law was upheld by the state trial court, the state appellate court and the Ohio Supreme Court. The Ohio Supreme Court specifically found:

> "The materials and services provided by R.C. 3317.06(H) do not lend themselves to the religious aura of the recipient sectarian schools. Upon the record before us, they enhance *only the secular educational process* and that process is properly the concern of the state."
>
> [28 Ohio St. 2d 83.]
> (Emphasis added.)

P.O.A.U. v. *Essex* was brought and tried as a class action. Plaintiffs did not see fit to appeal the Ohio Supreme Court Decision to this United States Supreme Court.

Not a Case of Nationwide Concern.

Appellants assert that the issues they present are of nationwide concern because, unless restrained, the Ohio Act could spread and result in widespread entrenchment of programs of questionable First Amendment consequence. To be sure, nonpublic schools throughout the country are confronted with financial headaches. But legislation similar to the Ohio Act won't solve their financial problems. If the health and auxiliary service assistance is stricken, the nonpublic schools won't spend more money. Nonpublic school children will simply be denied treatment of learning disabilities and handicaps. Likewise, if the material and equipment library-lending program to nonpublic school pupils is stricken, children

will be denied this added dimension which enhances their educational experience. This legislation doesn't directly or indirectly put money in the nonpublic school coffers. It simply removes handicaps and enriches the learning opportunities of deprived children.

In a series of establishment clause decisions starting with *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U.S. 602 (1971), and concluding with *Hunt* v. *McNair*, 413 U.S. 734; *Sloan* v. *Lemon*, 413 U.S. 825; *Committee For Public Education* v. *Nyquist*, 413 U.S. 756; *Norwood* v. *Harrison*, 413 U.S. 455; and, *Levitt* v. *Committee for Public Education*, 413 U.S. 472, in June of 1973, this Court announced Establishment Clause principles which had far-reaching effects upon the efforts of various states to alleviate financial hardships suffered in the nonpublic educational sector. These cases made it perfectly apparent that no new form of general purpose financial aid could be channeled directly or indirectly to nonpublic schools.

These principles were expanded in *Meek* v. *Pittenger*. However, this does not mean that the states must now ignore the plight of the child in a nonpublic school. In *Norwood* v. *Harrison* this Court made it clear that aid "properly confined to the secular functions of sectarian schools" will survive:

> "Neither Allen nor Everson is dispositive of the issue before us in this case. Religious schools 'pursue two goals, religious instruction and secular education.' [Authority cited] And, where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, States may assist church-related schools in performing their secular functions [Authorities cited], not only because the States have a substantial interest in

> the quality of education being provided by private schools [Authorities cited], but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others."
>
> [413 U.S. 468.]

Past decisions of this Court tell us that assistance, which is part of a general legislative program made available to all students, will survive to the extent that it is limited to bus transportation, school lunches, public health services and secular, neutral and non-ideological assistance unrelated to the educational function of the school.[1]

Appellants' claim that this case presents issues of national importance because of potential multi-state adaptation, is belied by the fact that the *Federal Elementary and Secondary Education Act*, which provides similar services, was adopted in 1965 and has been in effect for approximately 11 years. That Act provides health and auxiliary services and instructional materials and equipment to both public and nonpublic school pupils.[2]

The ESEA legislation was considered by this Court in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). Its continued implementation for 11 years has not resulted in the nationwide problem forewarned by appellants. The obvious explanation is that the federal legislation, like the Ohio Act, does not provide a solution to the financial plight of nonpublic schools. To be sure, it is supported by large appropriations,

[1] *Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975).
[2] For example see 20 U.S.C.A. §§ 823, 825, 241(e).

but this doesn't automatically provide a solution to the financial plight of nonpublic education. The important criterion relates to the use of the funds. If they provide health service, they don't solve financial problems. If they provide grants or credits, they do.

The nonpublic school is not the beneficiary regardless of whether the disabled child receives an expensive or inexpensive cure. If other tests are met, the Establishment Clause should be no more concerned if the state appropriates $10,000 in order to cure a physical, emotional or learning disability than if it appropriates $10.00 for that same purpose. Many of the disabilities sought to be remedied by this legislation are serious, destructive to the child and costly to treat. The cost of treatment is an educational and public policy decision rather than an Establishment Clause question.

B. The Unanimous Opinion of the Three-Judge Court Reflects a Careful Application of the Principles Enunciated by This Court in *Meek* v. *Pittenger*.

The lower court has a commendable history of respect for and careful application of principles enunciated by this United States Supreme Court. When Ohio adopted an educational grant program for nonpublic school pupils, the lower court demonstrated a keen sensitivity to significant Establishment Clause principles in its Opinion finding such grants to be violative of the First Amendment.[3]

Similarly, although the lower court upheld the constitutionality of former Ohio Revised Code §3317.062, when its judgment was vacated and

[3] *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972), aff'd 409 U.S. 808 (1972).

remanded in *Wolman* v. *Essex*, 421 U.S. 982 (1975) the lower court immediately restrained further implementation.[4]

The fact is that the Supreme Court of the United States has, in a series of First Amendment cases, starting with *Everson* v. *Board of Education*, 330 U.S. 1 (1947), clearly enunciated Establishment Clause principles applicable to nonpublic school pupil assistance. What is left is local application of those principles by educators, legislators and lower courts. Refusals by lower courts to follow these criteria or a misapplication of them may very well lead to further decisions by this Court. The constitutionality of the Ohio legislation, which has a unique legislative and implementation history, has been sustained by a lower court, and the Opinion of that court reflects an honest and careful application of the principles enunciated by this Court.

Secular Educational Materials and Equipment.

Appellant accurately notes that the major difference between the current Act and its predecessor with respect to the supply of secular materials and equipment is that the property is now loaned directly to pupils and parents rather than to schools. However, appellants' use of the words "ploy" and "sham" in characterizing the Ohio General Assembly's efforts to assist children in need would be more appropriate in a jury trial argument than in an analysis of Establishment Clause principles. There was nothing hidden or *sub rosa* about the legislative intent. The Ohio General Assembly has provided secular, neutral and nonideological equipment and materials for the benefit of nonpublic school pupils in Ohio for approximately nine years. The findings of the General Assembly have been consistent with those of the Ohio Supreme Court in *P.O.A.U.* v. *Essex*, and with the findings of this Court in *Meek* v. *Pittenger* — that is, that the "material and equipment that are the subjects of the loan — maps, charts, and laboratory equipment, for example — are 'self-policing,' in that starting as secular, nonideological and neutral, they will not change in use." [421 U.S. 365.]

Appellants were not able during their briefs or oral arguments to point to any constitutionally-meaningful distinction between books and materials when both are secular, neutral, nonideological and unable to be diverted to religious use. If there is no constitutionally-meaningful difference in the nature of the items supplied, then we must look to some other justification for the different treatment of the two in *Meek* v. *Pittenger*.

The Ohio General Assembly operated on the premise that the United States Supreme Court treated the two differently in *Meek* v. *Pittenger* because the books under the Pennsylvania program were loaned

[4] Appellants in footnote 3 at page 4 of the jurisdictional statement do not present a fully accurate representation of the consent order in *Wolman* v. *Essex*, No. 73-292, which found the prior legislation unconstitutional. Pertinent portions of the consent order recite:

"Counsel for defendants and intervening defendants have represented to this Court that they do not seek to urge distinguishing features between the Ohio legislation considered herein and the Pennsylvania legislation considered in *Meek* v. *Pittenger*, *supra*, and do not seek to urge the severability of various provisions in the Ohio legislation because the Ohio General Assembly has repealed that legislation and enacted new legislation (known as Senate Bill 170) providing nonpublic school pupil assistance.

* * *

"This order is not intended to address or adjudicate the constitutionality of Senate Bill 170."

[¶¶ 2 and 5 in November 17, 1975, Consent Order, *Wolman* v. *Essex*, Civil Action No. 73-292.]

to the pupils whereas the materials and equipment were loaned directly to the school. Thus, the new Ohio Act very carefully spells out a "lending-library" procedure for dissemination of educational materials to pupils. It authorized publicly-employed and controlled clerical personnel to administer the lending-library program.

The legislation in *Meek* v. *Pittenger* called for placing the control of the materials and equipment in the hands of a religious organization. *It permitted the religious organization to determine where, when and how the materials were to be used.* In *Meek* v. *Pittenger*, if the state wanted to make an investigation concerning the materials and equipment, it had to relate to the religious organization and become entangled with religious personnel. To the contrary, under the Ohio plan, the materials and equipment are in the possession and control of publicly-employed and controlled clerical lending personnel. If the state wanted to inventory the materials and equipment or make an investigation for educational or other purposes as to how the material or equipment was being used, distributed, stored, inventoried, catalogued or lent, it would relate not with religious organizations but to personnel hired and controlled by the local public school district.

Thus, we not only have a difference with respect to the direct recipient of the loan but also a difference with respect to potential entanglement.

In arguing that the identity of the recipient is not controlling, appellants try to compare the current Ohio plan to, for example a direct money-aid program such as that stricken in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). The comparison

is inappropriate. If the aid provided is not inherently secular, neutral and nonideological, then to be sure the identity of the recipient is less important. But, if the aid of necessity remains with the recipient and is inherently secular, the identity of the recipient is much more important. If the state gives the child money to turn over to the religious organization, the identity of the initial recipient is not particularly relevant. The question is, would the money turned over by the pupil or parent to the religious organization be for secular or religious purposes? This could only be determined by implementation of an entangling series of relationships between church and state.

However, if the state supplies a service such as speech and hearing therapy directly to a child at a public facility, there should be no legitimate concern about transfer of benefit to a religious organization. The recipient is clearly the child, and the secular and nonideological benefit cannot be transferred by the child to any religious organization. Likewise, if the state lends a piece of secular, neutral and nonideological equipment that is incapable of diversion to religious use directly to a child or his parent there can be no fear of conversion of that equipment to a religious use. Here, again, the identity of the recipient is significant because the aid program is incapable of flowing through to a religious organization via the child-conduit.

Although appellants at page 19 of their jurisdictional statement cite *Committee for Public Education* v. *Nyquist*, for the proposition that the identity of the recipient is not significant, the quoted portion from the Opinion is completely consistent with the foregoing analysis:

> "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . *In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes*, it is clear from our cases that direct aid in whatever form is invalid."
>
> [413 U.S. at 780.]
> (Emphasis added.)

This Court in *Nyquist* made it quite clear that it was rejecting *direct aid* to the religious school and that any indirect program which was designed to provide financial support for the sectarian institutions would be stricken. Under the Ohio Act, the aid is not directly to a religious organization, and there are effective means of guaranteeing that the state aid will be exclusively for secular, neutral and nonideological purposes.

Under the Ohio Act, the secular, neutral and nonideological assistance *stops with the child*, and there is no possibility for the child to act as a direct or indirect conduit of financial assistance to any sectarian organization.

It is unclear from appellants' jurisdictional statement whether they are arguing that a pupil is barred from borrowing secular, neutral and nonideological materials or equipment simply because he has selected a nonpublic school. We assume that every state has for years had mobile library programs which travel to public and nonpublic schools. The pupils are able to check out secular educational materials and books. How can it be argued that such a program violates Establishment Clause restrictions? By

creating the lending-library clerks, the Ohio General Assembly has established a program almost identical to the mobile libraries and has rather clearly avoided any Establishment Clause restraints.

Health, Diagnostic and Remedial Services.

Appellants, from the outset, have conceded that various severable provisions of the Ohio Act are indeed constitutional. Yet, there is no record basis for distinguishing that which they concede to be constitutional from that which they challenge as being violative of the Establishment Clause. For example, appellants concede the constitutionality of physician, nursing, dental and optometric services; but argue that diagnostic psychological and diagnostic speech and hearing services stand on a different footing. These arguments are without record support. Neither the diagnosing psychologists nor diagnosing remedial reading specialists can be compared to a teacher. Neither of these personnel is performing educational functions. They are strictly health functions, and as a matter of fact, may, pursuant to the Ohio Act, be performed by the Ohio Department of Health.[5]

As noted by the three-judge trial court "The parties have stipulated that the purpose of these diagnostic services is to determine if nonpublic pupils are deficient or in need of assistance in these areas."

Appellants also urge without justification that the dictum in *Meek* v. *Pittenger*, be rejected [Jurisdictional Statement, p. 25]. Since diagnostic services are clearly health services, this suggestion should not be adopted. Appellants' suggestion that health personnel

---

[5]The pertinent provision of the Act states:

"Health services provided pursuant to divisions D, E, F and G of this section may be provided under contract with the state department of public health. [R.C. 3317.06.]

will interpret "alleged heretical attitudes" as health problems is too utterly absurd to warrant response.

Appellants likewise, after conceding the constitutionality of providing remedial services to nonpublic school children at the public school situs, ask this Court to declare that the provision of such services in publicly-owned and controlled centers or mobile units violate Establishment Clause restrictions. Here, again, there is no record justification for such a distinction. If appellants would have this Court presume that a publicly-employed and controlled auxiliary service specialist would succumb to sectarianism simply because he was working with a child of a given religious persuasion at a public center, then it must logically follow that children of any given religious persuasion must be denied these services at all locations, even public schools. Appellants also try to gain jury-trial-type equities by unfairly referring to "curbside assistance" and "special satellite facilities." They also falsely suggest that substantial portions of the allocation of funds would be used to build public centers for the provision of such services. It's perfectly obvious that the Act does not authorize any such construction, and it is deceptive for appellants to urge that such could be done because there is no restriction in the Act. The stipulation with respect to the public situs of such services is clear and unequivocal.[6]

Appellants further present a strained argument that somehow or another a nonpublic school pupil would be receiving a special benefit if he received speech and hearing therapy in, for example, a public

[6]Stipulation No. 32 provides:

"The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers.

center such as a library, public meeting hall, firehouse or recreation center rather than in the public school. This assertion is without foundation in educational, health or financial fact. The ideal situs for, for example, speech and hearing therapy, would be the school of attendance. Since speech and hearing therapy personnel are not permitted to provide their services to a nonpublic school pupil at the nonpublic school, then he must travel to some public center to receive the service.

The situs of the service will depend upon the distance of the school of attendance from the local public school, safety factors involved in travel and the adequacy of accommodations in public schools and public centers. Can appellants really believe that a child with a hearing defect will be receiving an extra benefit if efforts to cure that defect take place at, for example, a special room in a public library rather than in the public school? The publicly-hired and controlled hearing therapist will be the same regardless of whether the service is provided in the public school, in a public center or in a mobile unit. The equipment will be the same. The program will be the same. There is no record evidence or basis in fact for arguing that the service will be more or less effective in either location. There is no record evidence or basis in fact for arguing that the nonpublic school would somehow or another benefit if the child received the service in a public center or mobile unit, but not if the child received the service in a public school, in a health center or in a hospital. It simply strains all rules of reason to argue that when a child receives speech and hearing therapy in a public center from a publicly-hired and controlled speech and hearing therapist, the end result is aid to religion. By arguing that there is no

difference between a public center and church-related school, appellants completely ignore a fundamental premise in *Meek* v. *Pittenger*.[7]

By seeking to ignore the difference between a publicly-owned and controlled center and a church-related school, appellants also ignore the excessive entanglement doctrine which applies only when the policing of an assistance program requires entangling relationships between church and state. If it were necessary to police a speech and hearing therapist providing services at a public center, the relationship would be between the state and a publicly-hired therapist performing services at a public facility. Also the likelihood of that therapist succumbing to sectarianism is removed when the therapist is no longer performing services "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."

Conclusion

The Ohio General Assembly has revised its legislation to comply with the principles enunciated by this Court in *Meek* v. *Pittenger*. Prior to 1967, when these services weren't available, children with severe learning disabilities led unhappy, troubled and frustrated lives. A child who had a hearing defect was punished because he wasn't achieving as he should in school. The child who was receiving low grades, might very well have been at the head of the class had he received remedial reading assistance. The child who was

[7]Mr. Justice Stewart in announcing the majority opinion stated:

"But they are performing important educational services *in schools* in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."

[421 U.S. p. 371.]
[Emphasis added]

placed in the corner or in the back of the room and ridiculed by other children might very well have needed physical or psychological help rather than discipline and ridicule. Remedial services essential to eliminate these handicaps and disabilities are expensive and it has proven to be a fact that they simply aren't available without special state assistance.

During the past nine years, while the State of Ohio has been providing such assistance, many thousands of children have been able to become productive citizens because their handicaps have been removed. This legislation has a sound secular purpose and effect, and can be administered without entanglement with religious organizations. This statute has been drafted carefully to meet the criteria enunciated in *Meek* v. *Pittenger*. The Ohio General Assembly was well intentioned in trying to continue this form of assistance to all of its children. The lower court properly declared Ohio Revised Code § 3317.06 and all of its divisible and separable branches to be constitutional.

Respectfully submitted,

David J. Young
250 East Broad Street
Columbus, Ohio 43215
(614) 228-4371

Attorney for Appellees
James Grit, et al.